Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

FCC 92-226
38409

In the Matter of	)	
	)	
AT&T COMMUNICATIONS	)	CC Docket No. 92-95
	)	
Revisions to Tariff F.C.C. No. 1	)	Transmittal Nos. 3380, 3537, 3542, and 3543
	)	

MEMORANDUM OPINION AND ORDER

Adopted: May 20, 1992; Released: June 2, 1992

By the Commission: Commissioner Duggan dissenting and issuing a separate statement.

I. INTRODUCTION

1. This Memorandum Opinion and Order sets forth the Commission's conclusions with respect to issues designated in the investigation of AT&T Communications' (AT&T) Transmittal Nos. 3380, 3537, 3542 and 3543. [1] The transmittals introduce tariff revisions to four AT&T optional calling plans (OCPs), which would limit availability of existing rate discounts under the OCPs to calls made with AT&T's new Card Issuer Identifier (CIID) calling cards, thus withdrawing existing discounts for calls made with other cards specified in the tariff. [2]

---

[1] AT&T Communications Revisions to Tariff No. 1, Transmittal Nos. 3380, 3537, 3542, and 3543, DA 91-1583, 7 FCC Rcd 156 (Com.Car.Bur. 1991), Erratum, DA 91-1591, 7 FCC Rcd 432 (Com.Car.Bur.) (1991) (Investigation Order).

[2] AT&T Tariff F.C.C. No. 1, Sec. 2.8.3.B.3, defines the "AT&T CIID/891 Card" as: an AT&T Calling card which contains a billing number issued to AT&T in the Card Issuer Identifier (CIID) or "891" international format. The CIID card number consists of a 10 digit account number and 4 digit personal identification number (PIN). The 10 digit account number is composed of a Bell Communications Research, Inc. (Bellcore) assigned 6 digit code which identifies AT&T as the card issuer, combined with a 4 digit code assigned by AT&T. The card numbering format is not based on a telephone line number. The tariff defines "Calling Card other than the AT&T CIID/891 Card" as including, for example, AT&T calling cards which are not in the CIID/891 format, other interexchange carrier (IXC) and local exchange carrier (LEC) calling cards, and

2. Based on our review of the record, the Commission concludes that AT&T's proposed tariff revisions do not violate the prohibition against unreasonable discrimination contained in Section 202(a) of the Communications Act, 47 U.S.C. § 202(a), and are therefore lawful. The proposed tariff revisions affect existing AT&T OCPs which, pursuant to the requirements of our OCP Guidelines, [3] are generally available to all customers. The dispositive fact is that AT&T's new CIID calling cards, and thus the OCP rates associated with those cards, are fully and freely available to any interested customer. No unreasonable discrimination against any customer will result from the proposed tariff revisions, because any customer can obtain the discount rates merely by choosing to accept and to use the new AT&T CIID card.

II. BACKGROUND

3. Between August 16, 1991 and October 11, 1991, AT&T filed with the Commission tariff revisions which changed the card discounts on four of its OCPs to limit the availability of the discounts to calls charged to AT&T's new proprietary calling cards in the CIID numbering format. [4] Currently, the tariff applies a calling card discount to all "Calling Card" usage (including, for example, LEC cards). [5]

4. AT&T stated that it was withdrawing the OCP discounts from calls made with other cards as a result of its change-over to a new system for processing credit card calls that was scheduled to occur on January 1, 1992. The change-over coincided with the expiration of AT&T's Shared Network Facilities Agreements (SNFAs) with the Bell Operating Companies (BOCs), which covered the post-divestiture sharing of the unified Bell System's calling card facilities. AT&T said that the expiration of these SNFAs required AT&T to redesign its entire process of handling a message billed to a calling card.[6]

---

commercial credit and charge cards. For ease of discussion, we will use the term "AT&T CIID" to refer to the AT&T CIID/891 card as defined in the tariff and "other card" to refer to those specified in the sentence preceding this.

[3] In the Matter of Guidelines for Dominant Carriers; MTS Rates and Rate Structure Plans, 59 RR2d 71 (1985).

[4] Transmittal No. 3380, filed on August 16, 1991, related to AT&T's Block-of-Time (Reach Out America) OCP. Transmittal 3357, filed on October 10, 1991, related to AT&T's Pro WATS OCP. Transmittals 3542 and 3543, filed on October, 11, 1991, related, respectively, to AT&T's Small Business OCP and its Plan D Service.

[5] For example, AT&T's Reach Out America (Block-of-Time) calling plan states: "The card option . . . include[s] in the calling plan all card calls (except Person-to-Person) made during the Night/Weekend rate period and billed to the Customer's Main Billed Account." AT&T Tariff F.C.C. No. 1, Sec. 3.2.1.I.1.

[6] Investigation Order at para. 5.

5. AT&T then asserted that: (1) contractual arrangements with the LECs deprived AT&T of the ability to extend OCP pricing automatically to non-AT&T CIID other card usage; and (2) technical and operational characteristics of its proprietary card call processing system also required such limitations.[7] According to AT&T, under the new separate AT&T and LEC card systems, the essential billing information needed for OCP pricing cannot be collected at the right place or time to apply the discounts to LEC card calls.[8]

6. On December 19, 1991, the Common Carrier Bureau suspended for five months the transmittals limiting the OCP card discounts and instituted an investigation of their lawfulness. AT&T was ordered to file a direct case responding to specific questions propounded in the Investigation Order. The specific questions related to AT&T's claims that it would not be feasible to include usage charged to LEC cards in a post-SNFA environment. In addition, AT&T was invited to offer other justifications for the price disparity.[9]

III. PLEADINGS

7. On January 30, 1992, AT&T filed its direct case in response to the Investigation Order. Oppositions to or comments on the direct case were filed on February 27, 1992 by American Public Communications Council (APCC), Bell Atlantic Telephone Companies (Bell Atlantic), BellSouth Telecommunications, Inc. (BellSouth), Competitive Telecommunications Association (CompTel), International Telecharge, Inc. (ITI), New York Clearing House Association and Visa, U.S.A., Inc. (VISA), Nycom Information Services (Nycom), NYNEX Telephone Companies (NYNEX), Southwestern Bell Telephone Company (SWBT) and Whidbey Telephone Company (Whidbey). AT&T filed its rebuttal on March 12, 1992.

A. AT&T's Direct Case

1. Rates Which Comply with the OCP Guidelines Cannot Be Discriminatory

8. In its direct case, AT&T states that its transmittals could not violate Section 202(a) of the Act because they affect existing AT&T OCPs which, pursuant to the requirements of the Commission's OCP Guidelines, are generally available to all customers.[10] AT&T argues further that there is no

---

[7] Id. at para. 8. The justification regarding the contractual arrangements was contained in AT&T's Reply to MCI's petition to reject Transmittal No. 3380. Id. at para. 4. The technical and operational justification was contained in supplemental information AT&T provided the Tariff Division in response to both formal and informal staff requests. See id. at paras. 5-6.

[8] Id. at para. 6.

[9] Id. at para. 11.

[10] AT&T Direct Case at 14, citing In the Matter of Guidelines for Dominant Carriers; MTS Rates and Rate Structure Plans, 59 RR2d 71 (1985) (OCP Guidelines Order).

discrimination as long as rates are made available to all customers who are ready, willing, and able to purchase the particular service.[11] Thus, according to AT&T, no discrimination against any customer will result from the tariff revisions because a customer can obtain the rates by ordering an AT&T CIID card which AT&T will supply upon request. AT&T says it already has supplied AT&T CIID cards to most customers of AT&T's OCPs. AT&T maintains that the transmittals are fully consistent with the Commission's OCP Guidelines and thus cannot be discriminatory under the Communications Act. AT&T argues that the dispositive fact is that AT&T's new calling cards, and thus the OCP rates associated with those cards, are fully and freely available to any interested customer.[12]

2. Any Discrimination Found To Exist Is Reasonable in the Circumstances

9. Even if there were a basis to find discrimination, AT&T argues, the rates at issue are demonstrably reasonable in the circumstances, and thus do not violate Section 202(a).[13] To support this assertion, AT&T claims the expiration of the SNFAs covering billing and validation systems used for both AT&T and LEC telephone line based and special billing number calling cards compel the tariff changes in the suspended transmittals. AT&T explains that under these shared systems, AT&T and the LECs each issued cards bearing the same numbers and honored each other's calling cards for both intraLATA and interLATA calls.[14] AT&T calls billed to either LEC or AT&T cards could be easily aggregated with other necessary information when a customer's bill was prepared, facilitating inclusion of AT&T calls charged to LEC calling cards in AT&T's OCPs.[15]

10. AT&T claims that separating the AT&T and LEC calling card systems required AT&T and the LECs to negotiate new contractual arrangements if they were to continue to offer their customers the convenience of using either a LEC or an AT&T card for both local and long distance calling. AT&T also stated that concern about its loss of ability to reject unilaterally calls charged to a LEC card number that had been involved in fraud on the AT&T, but not the LEC, network led AT&T to the conclusion that the card issuer should assume administrative and financial responsibility for calls charged to its cards. AT&T decided that both objectives could be achieved through execution of Mutual Honoring Agreements, or MHAs, with the LECs. AT&T states that it has executed

---

11 Id. at 14 n.**, citing MCI Telecommunications Corporation v. FCC, 917 F.2d 30 (D.C.Cir. 1990); Sea-Land Services, Inc. v. ICC, 738 F.2d 1311, 1316 (D.C. Cir. 1984).

12 Id. at 14-15.

13 Id. at 16.

14 Id. at 2.

15 Id. at 7.

approximated 1100 MHAs with individual LECs.[16]

11. According to AT&T, the MHAs make the card issuer, rather than the call carrier, take administrative responsibility for calls charged to its card.[17] AT&T states that this is the only way that mutual honoring could occur without requiring AT&T and a LEC to share customer account information about each other's cardholders.[18] To implement these changes in financial responsibility, AT&T explains, the MHAs change the routing of billing information. According to AT&T, when a LEC assembles and renders its bill to the customer, the charges for AT&T calls charged to the LEC card will appear on the LEC portion of the bill, completely separate from other AT&T messages. AT&T claims that this separation means that information needed to calculate the AT&T OCP discounts for these calls is lacking and thus they cannot be included in the AT&T OCP discounts.[19]

12. AT&T asserts that making changes to permit it to include LEC calls in its OCPs would be unreasonably costly and burdensome. It notes that interim procedures required to enable it to offer OCP discounts to calls charged to LEC cards during the suspension period have been costly and burdensome to it and cannot be sustained for any substantial period of time.[20] AT&T states that because the cost of eliminating the rate difference is great and only an extremely small group of customers would benefit from its elimination, the OCP rate differences should be considered reasonable, and thus lawful, under

---

16 Id. at 16-17. Although AT&T drafted the basic model MHA, negotiations with the LECs led to "quite similar, but not uniform" agreements. Id., Attachment B at 1-2. AT&T annexed a redacted version of the basic model MHA as Appendix I, and provided a complete version but requested confidential treatment for the latter. At the Bureau's request, AT&T also submitted copies of its MHAs with each of the BOCs and the GTE Telephone Operating Companies, also seeking confidential treatment for these submissions.

17 Most of the MHAs do this by requiring the card issuer to purchase the accounts receivable for calls charged to its cards. AT&T Direct Case at 16-17, n.1.

18 Attachment B at 5-6.

19 AT&T Direct Case at 17. AT&T explains that calculating OCP card discounts on calls charged to LEC cards requires combining card usage information with information on many, if not all, of the customer's other calls. AT&T states that because the MHAs require the parties' systems automatically to separate AT&T calls charged to LEC cards from other AT&T calling records, the former calls cannot be rated with the OCP discount. Id. at 18.

20 Id. AT&T claims that its temporary procedures for smaller ICOs cost approximated $1 million to establish and service only about 10, 000 customers. Id., Attachment C at 1.

Section 202(a) of the Act.[21]

B. Opposition to AT&T's Direct Case

13. Every party filing in response to AT&T's direct case challenges AT&T's factual and legal justifications for the rate disparity that the tariff revisions would create.

1. The Tariff Revisions Create Rate Discrimination

14. Several Commenting parties challenge AT&T's legal argument that the "dispositive fact" with respect to the existence of discrimination is that its CIID cards, and thus the OCP rates associated with them, are available to all to all customers on the same terms and conditions. SWBT states that the proposed tariff revisions would create a discrimination because customers will not be able to continue to use their familiar telephone line number cards, whether issued by AT&T or a BOC, and still receive AT&T OCP discounts.[22] NYNEX claims that the OCP Guidelines, with which, AT&T asserts, its transmittals comply, merely established standards for determining the reasonableness of OCP rates, not the terms and conditions under which those rates are made available to customers. It adds that unlike the AT&T OCP that the Commission found to be discriminatory in the MCI OCP proceeding,[23] the discount for AT&T CIID cards would not be customer neutral, but would be available to only particular customers. Moreover, NYNEX asserts, there is no rational basis for limiting calling card discounts to calls made with an AT&T CIID card.[24]

15. BellSouth argues that in American Trucking Association, Inc. v. FCC,[25] the court unequivocally rejected AT&T's general availability argument. It concludes that AT&T failed to show that it is equitable to charge different rates for concededly identical common carrier services based solely upon the calling card billing option chosen by the customer.[26] Several parties add that MCI Telecommunications and Sea-Land Service, Inc. do not preclude a finding of discrimination because these cases hold merely that the use of contract rates is not per se unlawful, if equivalent rates are made generally available to similarly situated parties willing and able to meet the contract terms.[27]

---

21 Id. at 18.

22 SWBT Opposition at 2.

23 MCI Telecommunications, 104 FCC 2d 1383 (1986).

24 NYNEX Comments at 2-4 & n.9.

25 377 F. 2d 121 (D.C. Cir. 1966), cert. denied, 386 U.S. 943 (1967).

26 BellSouth Opposition at 5-6.

27 See, e.g., BellSouth Opposition at 5; CompTel Opposition at 3-4; ITI Opposition at 5-6.

16. ITI asserts that whether rates are generally available to similarly situated customers is simply a threshold question; the Commission must still conduct a three part inquiry into 1) whether the two services are "like"; 2) if so, whether there is a price difference; and 3) if there is a difference, whether it is reasonable.[28] VISA states that the service provided to AT&T CIID cardholders is long distance telephone service billed to a calling or credit card, a service identical to that being provided to non-AT&T cardholders and differing only in the rate charged, a factor not considered in determining whether services are "like."[29] It adds that with likeness and price disparity established, AT&T must justify the price disparity as reasonable.

2. The Rate Discrimination is Unreasonable

17. Virtually every party commenting on AT&T's direct case argues that the tariff revisions would create unreasonable discrimination. For example, NYCOM maintains the revisions would unfairly penalize any customers who retain their LEC cards, but still use AT&T and an AT&T OCP for long distance service by charging those customers a higher rate for like services.[30] Whidbey argues that AT&T's dominance in the interstate MTS market, especially in service areas like Whidbey's, where AT&T is the sole provider of interstate interLATA MTS and WATS service, distinguishes the discrimination created by AT&T's OCP limitations from any contained in other IXC tariffs. Whidbey compares the AT&T tariff revisions to tying arrangements proscribed under antitrust law.[31] VISA argues that the tariff revisions discriminate unreasonably against customers who bill calls to non-AT&T commercial credit cards.[32]

18. ITI and CompTel state that because AT&T and the LECs previously shared customer account information needed to apply the OCP discounts to all card usage, the discrimination could have been avoided if AT&T had chosen to modify its business decision. They urge that if AT&T and the LECs will not voluntarily modify the MHAs to eliminate the terms causing the discrimination, the Commission should act under Section 211 to require these carriers to do so.[33] APCC adds that because AT&T failed to explain why its business decision in response to termination of the SNFAs legitimizes the discrimination arising under its new systems, the Commission must conclude that AT&T has unnecessarily adopted a system that arbitrarily excludes holders of line-number based AT&T or

---

28 ITI Opposition at 6, citing MCI, 917 F. 2d at 39.

29 VISA Opposition at 5-6.

30 NYCOM Opposition at 8-9.

31 Whidbey Opposition at 5-7.

32 VISA Opposition at 2-4.

33 ITI Opposition at 10-11; CompTel Opposition at 6; accord SWBT Comments at 2-6; Whidbey Opposition at 12-13.

LEC issued cards from receiving the OCP discount.[34]

19. Bell Atlantic, BellSouth and NYNEX assert that the anticipated expiration of the SNFAs governing shared calling card validation facilities do not compel AT&T to limit OCP pricing discounts to AT&T CIID cards.[35] Bell Atlantic says that expiration of the SNFAs means only that in order to validate a Bell Atlantic calling card, AT&T will send an inquiry to Bell Atlantic's line information database (LIDB) instead of to the previously shared system. These inquiries, Bell Atlantic continues, merely tell AT&T whether the calling card number is valid; neither AT&T nor Bell Atlantic use them to determine whether a discount applies to rate the call or to render the bill.[36] BellSouth adds that, while mandating separate validation databases, the Plan of Reorganization, or POR, left the parties considerable discretion to develop their own policies for calling card issuance, billing and collection. BellSouth states that policy choices, not POR requirements, impelled AT&T's decision to withdraw OCP discounts for messages charged to LEC-issued calling cards.[37]

20. NYNEX states that it has no contractual arrangement that prevents AT&T from continuing to apply OCP discounts to calls made with a NYNEX company card. It explains that AT&T has tried to condition its continued acceptance of LEC cards on their executing MHAs, the terms of which could make it technically infeasible to continue to apply OCP discounts to LEC card calls when customer bills are calculated. NYNEX adds that nothing prevents AT&T and a LEC from modifying an MHA to allow AT&T to continue to apply OCP discounts to calls made with a LEC card. NYNEX asserts that it already has incentives to minimize fraudulent use of its cards because it receives substantial intraLATA revenues from calling card calls and because its card is accepted by all major IXCs, who would discontinue this practice if NYNEX did not keep fraud to a minimum.[38]

21. BellSouth concedes that to the extent an MHA requires a card issuer to purchase accounts receivable associated with calls charged to its cards, this makes it "infeasible" for calls charged to LEC cards to be included in AT&T's OCP because AT&T services charged to that card are recorded as BOC revenue and segregated from CIID billing, which is recorded as revenue due AT&T. This separate accounting treatment would make uniform application of OCP discounts to both message types extremely cumbersome. BellSouth notes, however, that nothing prevents the use of an MHA with different accounting provisions. It states that its MHA with AT&T calls for AT&T to record and

---

34 APCC Comments at 4-5.

35 BellSouth Opposition at 2-4; Bell Atlantic Response at 2-3; NYNEX Comments at 4-5.

36 Bell Atlantic Response at 2-3; accord BellSouth Opposition at 3-4.

37 BellSouth Opposition at 4.

38 NYNEX Comments at 5-6, n.12; accord Whidbey Opposition at 9-12.

rate LEC line number calling card messages and to transmit these, as well as CIID card message data, to BellSouth for billing.[39] BellSouth then calculates any applicable OCP discount and sends the customer a consolidated bill. All qualifying card calls receive the discount and all are identified as AT&T services on the AT&T part of the customer bill. BellSouth states that the cost of the system and operations changes needed to create this billing process, which it assumed, were not substantial. It adds that its MHA also contains terms that still effectively limit IXC exposure on fraud and uncollectibles.[40]

C. AT&T Reply

22. AT&T characterizes the transmittals' opponents as competitors whose arguments reflect only their self interests.[41] AT&T maintains that requiring it to offer OCP discounts to calls charged to LEC cards would only boost the LECs' non-tariffed billing services at the cost of reduced competition in the interexchange services market. AT&T argues that the Communications Act does not compel it to offer an already generally available rate through multiple optional billing vehicles.[42] In response to VISA's discrimination argument, AT&T notes that the number on the AT&T Universal Card cannot be used in connection with OCP discounts. It explains that none of its new calling card systems interacts with the systems that support the commercial credit card number on the AT&T Universal Card.[43]

23. Finally AT&T reiterates that it acted reasonably in deciding to issue and accept its new calling cards, and that these decisions permit it to offer its customers additional options that will enhance competition for interexchange services. AT&T says it based its decisions on non-discriminatory commercial charge card practices and financial principles necessary to control fraud and uncollectible expenses. In addition AT&T notes, none of its customers have objected to these tariff revisions, and any who fail to use the AT&T CIID card and so forego the OCP discounts on any particular call do so by their own choice, not AT&T's. AT&T maintains that such a choice cannot constitute discrimination under Section 202(a).[44]

---

39 BellSouth Opposition at 7-8. In ex parte discussions with Bureau staff, AT&T confirmed that Pacific Bell and US West Communications also executed MHAs with provisions like that of BellSouth's. See Letter from R.L. Buchwalter, AT&T, to Ms. D. Searcy, Mar, 30, 1992, Re: Ex Parte Meeting in [sic] Docket 91-1583.

40 BellSouth Opposition at 8.

41 AT&T Rebuttal at ii.

42 Id. at 7-9, 10 n.***.

43 Id. at 11 n.*.

44 Id. at 14-15 n.*, citing MCI, 104 FCC 2d at 1394.

IV. DISCUSSION

A. Discrimination Analysis

24. Section 202(a) of the Communications Act prohibits unjust or unreasonable discrimination in the provision of "like" services. To determine whether an offering complies with the carrier's duty to refrain from unreasonable discrimination in the provision of "like" services, the Commission engages in a three-step inquiry. Specifically, the Commission must determine: (1) whether the services are "like"; (2) if so, whether there is a price difference; and (3) if so, whether the price difference is reasonable. [45] If two services are "like," the burden rests with the carrier to demonstrate that any disparity in the pricing of the two services is reasonable. [46]

B. Application of Discrimination Analysis to AT&T's Offerings

1. Like Services and Price Discrimination

25. There is no dispute over the "likeness" of the service at issue: MTS service charged to a calling card. Under the current tariff, OCP customers who charge this MTS service to a LEC card or an AT&T CIID card will receive the card discount applicable to their particular plan. [47] Under AT&T's tariff

---

[45] See, e.g., MCI Telecommunications Corp. v. FCC, 917 F.2d 30, 39 (D.C. Cir. 1990) (Tariff 12 Decision).

[46] See, e.g., AT&T Communications, Revisions to Tariff F.C.C. No. 12, Memorandum Opinion and Order, 4 FCC Rcd 4932, 4935 (Tariff 12 Order), recon. denied, 4 FCC Rcd 7928 (1989).

[47] Under Reach Out, for example, the customer chooses to pay a monthly charge to obtain a cumulative total amount of calling time per month for dial station calls during the Night/Weekend rate period. If more than the chosen amount of calling time is used, the additional time will be totalled and rated using a discounted per-minute rate. Recurring charges under Reach Out consist of a monthly charge and per minute charge for periods over the basic block of time; the monthly charge applies regardless of whether the customer makes any calls and the per minute charge applies to all calls in excess of the initial block which are made during the Night/Weekend period. Two additional options involving card usage may be obtained for an additional monthly charge. Both card options waive the service charges normally associated with calling card calls ($.80 per call) made during the Night/Weekend rate period. This represents an extra discount above the basic block-of-time discount. In the case of Reach Out, Transmittal 3380 would limit the card options to include only those calls charged to an AT&T CIID card. See AT&T Tariff F.C.C. No. 1, Sec. 3.2.1.I.1. The result for Reach Out customers who choose to use any other card is that (1) those card calls will no longer count toward filling the initial 30 or 60 minute block-of-time purchased; (2) they will no longer receive a discounted per minute rate for usage beyond the initial block for such calls; and (3) they will now pay the $0.80 service charge normally associated with card calls whenever they use a card other than the AT&T CIID

revisions, only OCP customers who charge this MTS service to an AT&T CIID card receive the discount; OCP customers who charge this MTS service to another card that AT&T accepts will not receive the discount.

26. We conclude that the services are "like" and that there is a price difference. The burden therefore rests with AT&T to show that the discrimination in pricing is reasonable. [48]

2. Reasonableness of the Discrimination

27. Upon review of the record produced in this investigation, we find that the Common Carrier Bureau, in making its finding that the revisions raised serious questions of compliance with Section 202(a), focused almost entirely on the factual justifications for the reasonableness of the discrimination proffered by AT&T. The impact of the general availability of the AT&T CIID card, and the consequent factor of consumer choice, on the issue of the reasonableness of the discrimination was not considered. We will first address the question of whether the price discrimination established by the tariff revisions at issue is reasonable because AT&T is making the AT&T CIID card, and thus the OCP rates associated with its use, generally available to similarly situated customers, and then we will turn to the factual issues designated in the Investigation Order.

28. a) General Availability -- AT&T contends, in essence, that this transmittal presents no question of discrimination because any OCP customer can obtain a CIID card and, therefore, AT&T will not be charging different rates to different classes of customers. We are not persuaded by AT&T's argument insofar as it disputes whether the tariff revisions will introduce discrimination. However, the Act prohibits only unreasonable discrimination. Thus, our rejection of AT&T's argument does not end our inquiry. Rather, we must consider whether the price difference for MTS service introduced by the tariff revisions is reasonable. We conclude that the general availability of the AT&T CIID card renders the price discrimination created by the tariff revisions reasonable, because customer choice, rather than a carrier-imposed barrier, controls the availability of the discounted rate.

29. It is true that different OCP customers will prefer different cards, [49] and those customers preferences will create distinct classes of

---

card.

[48] See, e.g., Tariff 12 Order, 4 FCC Rcd at 4935.

[49] Some customers will prefer cards that incorporate a local telephone number because it is easier to remember. Some customers will prefer a LEC card since any interexchange carrier can validate the card. This feature permits customers to place 0+ calls at virtually any payphone or other aggregator location, regardless of whether that location is presubscribed to AT&T. Other customers will prefer an AT&T CIID card because AT&T will not permit other long distance carriers access to the data to validate the card and bill the call. For them, use of the AT&T CIID card will provide assurance that the customer

customers. However, it is the customer, not AT&T, who will determine which class to join. In this particular case, there are no unreasonable obstacles preventing customer choice and no qualifying criteria to unreasonably limit those customers eligible for AT&T's CIID card. Rather, the revisions simply create two different prices for MTS service but, in our view, it is not an unreasonably discriminatory price difference because the customer selects which price to pay by using the AT&T CIID card, which AT&T will provide freely.[50]

30. We believe a key question in determining whether unreasonable discrimination exists is whether OCP customers who choose to use a CIID card and those who choose to use another card are similarly situated. We conclude that they are not. Some OCP customers will chose to charge their calls to a line number-based card (whether issued by AT&T or the LECs), and that customer choice will render them "unwilling" to meet the terms of the OCP tariffs, as revised by the transmittals under investigation. If, as is the case for these tariff revisions, there are no carrier-imposed barriers to meeting those terms and conditions and, indeed, the carrier is actively facilitating compliance with those terms and conditions (by issuing CIID cards to any customers who could use them) any unwillingness on the part of customers to avail themselves of the OCP rates is the result of the customers' choice, not AT&T's. [51] Thus, we conclude that any customers choosing to use a calling card other than the AT&T CIID card are not similarly situated to those customers who choose to use the AT&T CIID card.

---

will not receive a bill for the services of a carrier that the customer did not intend to use. We will address issues relating to IXC calling cards usable with 0+ dialing in CC Docket No. 92-77, which was established to consider the question of billed party preference and related matters. See Notice of Proposed Rule Making, CC Docket No. 92-77, released May 8, 1992.

[50] The transmittals under investigation do not change current practice with respect to AT&T's treatment of commercial credit or charge cards in its tariff. Therefore, we do not address the discrimination argument raised by VISA at this time because it is beyond the scope of the issues designated in the Investigation Order.

[51] We note that AT&T has been accused of engaging in questionable marketing practices with respect to its new CIID card, particularly the direction to AT&T customers to "destroy your old card" in the context of marketing literature discussing unspecified "government requirements" which prohibit AT&T from "sharing card numbers with your local telephone company." SWBT, for example, has claimed that these statements have led some customers to believe incorrectly that their SWBT cards will no longer be usable on the AT&T network, and that they should destroy their existing SWBT cards. See SWBT Comments at 8-9. AT&T has not attempted to rebut arguments aimed at its marketing practices, beyond arguing that such claims do not raise any issues cognizable under Section 202(a). See AT&T Rebuttal at 8 n.*. This issue is being investigated elsewhere by the Commission. By our action in this docket, we do not prejudge the outcome of those separate investigations, including any findings concerning the reasonableness of AT&T's practices or remedies for practices found to be unlawful.

31. We recognize, as we said in the MCI OCP proceeding, that "general availability of an offering alone cannot guarantee that it is lawful." [52] However, as in that case, we find merit in AT&T's argument that general availability and customer choice, in combination with compliance with the OCP Guidelines Order, supports a finding that these tariff revisions are not unreasonably discriminatory under Section 202(a). The Commission found, in the MCI OCP proceeding, that the Reach Out plan under scrutiny was not unreasonably discriminatory because the OCP rates were available to all customers, and thus receiving, or not, the lower rate "is their choice, not AT&T's," and the rates were otherwise in compliance with the OCP Guidelines. [53] The tariff revisions under investigation here are no different: the OCPs continue to comply with the OCP Guidelines and receipt of the OCP rate for card calls is within the control of the customer. If the customer wishes to have his or her card call included in an OCP, all that is required is use of the AT&T CIID card, which, in turn, is generally available to any interested customer.

32. Accordingly, we conclude that no unreasonable discrimination cognizable under Section 202(a) is introduced by AT&T's proposed tariff revisions.[54] We emphasize that this finding is specific to the facts of this inquiry. The extent to which future AT&T price revisions may similarly be found as not unreasonably discriminatory must be resolved on a case-by-case basis with full consideration of the potential restrictions on customer choice.

33. b) Other Justifications -- AT&T, in its direct case, relies primarily upon contractual and technical limitations to justify the discrimination. AT&T also maintains that any discrimination is reasonable because AT&T wanted to offer a calling card with special features, its competitors offer similar calling card features, and the costs of remedying the discrimination "dwarf" the potential benefit to a very small group of customers. Because AT&T's contractual and technical justifications were designated as issues in the Investigation Order, we will briefly address these justifications.

34. The record clearly shows that AT&T made what it termed a "policy decision" to limit the availability of discounts associated with its OCPs to

---

52 104 FCC 2d at 1394 n. 29 (citing American Trucking Association v. FCC, 377 F.2d 121 (D.C.Cir.), cert. denied, 386 U.S. 943 (1966)).

53 104 FCC 2d at 1394.

54 We note also that no challenge has been brought as to the reasonableness of either the OCP rates which will be charged AT&T CIID card users, or the reasonableness of the basic MTS rates which will be charged users of other cards, under the tariff revisions. Again, where customer willingness or unwillingness to take and use the CIID card is the determining factor, and the card itself is generally available, the resulting rate differentials are not unlawful under Section 202(a) of the Act.

AT&T CIID users. [55] The contractual arrangements and operational systems which followed reflect this decision. [56] In AT&T's words, they met its "marketing objectives." [57] To the extent that their operation would prevent AT&T from granting non-CIID card users OCP discounts, this effect was ultimately attributable to an AT&T marketing decision rather than any immutable technical or operational limitation. In light of our finding that the discrimination created by the transmittal would be reasonable, we need not address here whether there would be situations in which marketing objectives, for example, triggered by competitive conditions, could justify discriminatory rates. We find, however, that neither the contractual nor the technical limitations alleged by AT&T would per se justify the discrimination in rates proposed in the transmittal. The claim that tariffs of competitors contain similar provisions also does not provide an adequate justification. Uninvestigated tariff provisions of other carriers do not support an inference with respect to the lawfulness of this tariff. The assertion that the rate disparity will impact relatively few customers is also an inadequate justification for discrimination in rates. Section 202(a) prohibits any unjust or unreasonable discrimination in charges. It does not make exceptions for unreasonable discrimination against, or undue preferences that disadvantage, only a few customers.

V. CONCLUSION

35. The Commission has reviewed the tariff transmittals, the direct case, the supporting materials, the pleadings, and the comments filed in this docket. We find that the tariff revisions under investigation do not establish unreasonably discriminatory rates, terms and conditions of service. Any variation in rates charged to OCP customers under the revisions result solely from customer choice, not AT&T's. We therefore conclude that the tariff revisions do not violate the statutory prohibition against unjust and

---

55 See Bell Atlantic Response at 1-2 and attached letter from Russell D. Morgan, AT&T, to J. R. Weber, Bell Atlantic, dated December 18, 1989, at 1.

56 The facts contradict AT&T's portrayal, in its direct case, of a monolithic contractual framework which deprives AT&T of the ability to include LEC cards in the OCPs. The actual MHA situation is neither uniform nor does it compel the rate discrimination which results from these tariff revisions. This is also true of the operational justification proffered: rather than the monolithic system changes which AT&T claims are responsible for the withdrawal of OCP pricing for cards other than AT&T CIID cards, it is evident from the record that at least some LECs appear to be technically and operationally capable of continuing to include LEC card usage in the calculation of charges pursuant to AT&T OCPs. Even among the LECs who have admitted that under their MHAs, inclusion of LEC card usage has been rendered operationally impractical in the near term, the record reveals a consensus that this situation can be rectified with relative ease and at reasonable cost. See e.g., Bell Atlantic Response at 3-4. Moreover, the procedures creating this situation were insisted upon by AT&T, over the objections of some LECs.

57 See Investigation Order at para. 6.

unreasonable discrimination contained in Section 202(a) of the Communications Act and therefore we find them to be lawful.

VI. ORDERING CLAUSES

36. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), 202(a) and 204(a), of the Communications Act, 47 U.S.C. §§ 154(i), 154(j), 202(a) and 204(a), that the investigation of AT&T Communications, Tariff F.C.C. No. 1, Transmittal Nos. 3380, 3537, 3542, and 3543, IS TERMINATED, Transmittal Nos. 3380, 3537, 3542, and 3543 ARE LAWFUL.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy

Donna R. Searcy
Secretary

Dissenting Statement
of
Commissioner Ervin S. Duggan

In Re: AT&T Communications, Revisions to Tariff F.C.C. No. 1, Transmittal Nos. 3380, 3537, 3542, and 3543

In this order, the Commission concludes that it is reasonable for AT&T to deny calling-card discounts to its Reach-Out America customers when those customers bill the AT&T call to a local exchange telephone company (LEC) card rather than to an AT&T proprietary ("CIID") card. The effect of this decision is to deny to certain customers, simply because they have chosen one billing mechanism over another, a discount they once enjoyed for calling card calls. And AT&T has not demonstrated, nor even asserted, that it costs more to bill calls tc a LEC card than to an AT&T CIID card.

I am troubled by the Commission's decision today because it appears to allow discrimination without cost justification or other substantial justification. It allows this discrimination, moreover, in the market for operator services, a market in which the Commission faces significant unresolved questions about whether competition is sufficient.

The Communications Act in Section 202(a) prohibits carriers from engaging in unreasonable discrimination among customers of like services. In this case, the Commission has concluded that services billed to different calling cards are indeed "like" each other, and that the difference in prices charged by AT&T is indeed discriminatory. The sole remaining issue, then, is whether the discrimination is reasonable--- a major issue, since discriminatory price differences that are deemed unreasonable are unlawful. The burden of justifying discriminatory rates is on the carrier.

Discrimination may be justified as reasonable on various grounds--- on the basis of cost differences or on transitional grounds, for example.[1] But such justifications have not been

---

[1] See, e.g., National Association of Regulatory Utility Commissioners v. FCC, 737 F.2d 1095, 1136-37 (D.C. Cir. 1984), cert. denied, 105 S.Ct. 1224 (1985); American Trucking Associations, Inc. v. FCC, 377 F.2d 121, 128 (D.C. Cir. 1966), cert. denied, 386 U.S. 943 (1967).

advanced here. And as the Commission recognizes, merely demonstrating that proprietary cards are "generally available" to all customers is not a sufficient justification for discrimination.[2] Instead, the Commission finds the discrimination here reasonable because customers can choose whether to use AT&T's proprietary card, and get the discount, or choose to use the line-based local exchange telephone company card, and be denied the discount.

In fact, the choice is a pressured one. Customers must give up the convenience of using a line-number-based card in order to qualify for the discount in question. The relative merits of the cards themselves should drive the decision about which card to use. But when the rates that attach to the cards are unrelated to the cost of billing to those cards, then competition among cards is potentially distorted. If, on the other hand, AT&T had shown that it cost more for it to bill calls to the line-based cards, then this would be a meritorious case, in my view. But AT&T has not asserted that there is any cost basis for this discrimination. And the Commission has rejected AT&T's argument that technical and operational factors require it to deny the discount to non-proprietary cardholders.

The reason that AT&T is offering discounts only to customers who use its card is understandable: it is attempting to impel as many customers as possible to use its proprietary cards. This is not an uncommon business practice in other, highly competitive, markets. But we have not yet determined that the operator services market is fully competitive. In fact, we recently issued a Notice looking into the effect of AT&T's use of proprietary cards on the competitiveness of that market. In particular, we raised questions about the effect of AT&T's use of such cards on the public phone presubscription market.[3]

The Commission's decision in today's order permitting AT&T to limit discounts to users of its proprietary cards will have another effect: it is likely to further impel premises owners to select AT&T as their presubscribed carrier for operator services. It strikes me as unwise, as well as premature, to allow AT&T to

---

[2] Order at para. 31, citing MCI Telecommunications, 104 FCC 2d 1383, 1394 n. 29 (1986), and American Trucking Associations, Inc. v. FCC, 377 F.2d 121.

[3] Billed Party Preference for 0+ InterLATA Calls, Notice of Proposed Rulemaking, CC Docket No. 92-77, FCC 92-169, released May 8, 1992, at paras. 36-43.

provide discriminatory discounts on its proprietary cards while questions about that market remain unresolved.

Finally, I am concerned about the precedent that could be set by today's decision. The logic of this order implies that any carrier may discriminate among customers for any service, regardless of whether the market is fully competitive--- and without providing the substantial justification that the Commission has traditionally required before deeming discrimination lawful. Such a hands-off approach may make sense in the market for business services, which we have characterized as substantially competitive. But should we be equally tolerant with respect to markets that we have not yet determined to be substantially competitive, such as operator services? I have my doubts, and therefore must dissent.

# # # #